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Khew Chee Sun v Best Tile Marketing Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCvC-930–12 OF 2019
RAJA AHMAD MOHZANUDDIN SHAH JC
20 NOVEMBER 2023

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Contract — Agreement — Royalty agreement — Breach of — Plaintiff filed claim against defendant due to defendant's alleged failure to pay plaintiff remaining royalty payments — Whether plaintiff exclusive agent for imported tiles manufactured by Belgian company ('ATAB NV') — Whether defendant had engaged in business transactions with ATAB NV from 16 June 1995 till 12 December 2019 being date of filing of suit — Whether plaintiff entitled for all of royalty payments from accrued date of 25 May 1996 to 12 December 2019 — Whether cheques issued by defendant's director to plaintiff part of royalty payments on behalf of defendant — Whether there existed friendly loan agreement

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The plaintiff and the defendant entered into an agreement ('the royalty agreement') and the defendant's director ie Poh Soon Terng ('DW1') signed the royalty agreement on behalf of the defndant. The plaintiff claimed that under the royalty agreement, he was an exclusive agent for imported tiles manufactured by a Belgian company named ATAB NV. Based on the royalty agreement, the defendant appeared to have exclusive rights to import the tiles for sale in the Malaysian market. Pursuant thereto, a royalty advances for four subsequent months, ie June 1995, July 1995, August 1995 and September 1995 of RM30,000 was paid to the plaintiff. The plaintiff, however, claimed that after this advance payment, the defendant failed to pay him continuous royalty payments until October 2015. The plaintiff launched numerous efforts to obtain such payments. This led DW1 to issue the plaintiff with five personal post-dated cheques amounting to RM55,000. According to the plaintiff, those payments totalling RM55,000 were royalty payments for October 1995 through April 1996. However, no further payments have been made by the defendant up to this point. The plaintiff then requested from the defendant its accounts and sales statements from June 1995 to February 2016 as well as the outstanding royalty sum due to him. The defendant, however, had not responded to the plaintiff although the demand was admitted to having been received. Due to the defendant's alleged failure to pay the plaintiff the remaining royalty payments, the plaintiff filed this breach of contract claim against the defendant. According to the defendant, its company had been dormant since 2005. As for the RM55,000 payment, the defendant and DW1 claimed that the plaintiff requested financial assistance when he met with DW1 in October 2015. When the plaintiff refused to leave his premises without

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financial assistance, DW1 granted him a friendly loan, and those payments were not royalty payments. This led to DW1's counterclaim for RM55,000.

Held, dismissing the plaintiff's claim and DW1's counterclaim:

(1) DW1 agreed not only to the fact that the plaintiff had informed him that the plaintiff was an official agent of ATAB NV and that he trusted the letter from ATAB NV that indicated so, but DW1 also agreed that, since the plaintiff gave the defendant the right and permitted the defendant access to ATAB NV, the defendant then proceeded to purchase the products directly from ATAB NV without the plaintiff's involvement. The plaintiff had been the exclusive agent for ATAB NV (see paras 32 & 34).

(2) The defendant did not engage in active business activities between 2005 and 2018. Since there were no revenues between 2005 and 2018, there could have been no transactions between the defendant and ATAB NV, otherwise they would have been reflected in the financial statements. Further, the plaintiff offered no evidence to refute the defendant's position. There was nothing that tied the defendant and ATAB NV together during the period in question. Although there was an inconsistent fact made in the defence that mentioned the year 2015 as the start date of the company's dormancy, which was said to be a typographical error on the defendant's part, and despite the fact that generally an amendment was required, it could not be ignored that the documents provided during the trial showed that the company had not had any revenue since 2005, which combined with DW1's testimony, suggested that the actual date was 2005, not 2015. The defendant did not conceal any facts related to this matter. There was only a discrepancy in the year, and none in any other. Section 114(g) of the Evidence Act 1950 could not be invoked to draw any adverse inference for the defendant's failure to provide the so-called required data and sales figures (see paras 40, 43 & 50–51).

(3) Since there were no revenues from 2005 through 2018, there could have been no transactions between the defendant and ATAB NV. As such, the period from 2005 to 2018 was irrelevant and of no consequence. With s 245(3) of the Companies Act 2016 where companies were only required to retain records for seven years after the completion of the transactions or operations to which the entries related, the plaintiff could not now come to court and demand the defendant to produce the documents spanning over 20 years ago. The court was not in a position to declare the plaintiff's right to have an order for the defendant to produce and deliver to the plaintiff the audited statement of accounts, management accounts, receipts, vouchers, sales invoices, delivery orders, sales orders and purchase orders between 25 May 1996 and 12 December 2019.

Furthermore, since the plaintiff was an exclusive agent for ATAB NV's products, there was nothing stopping him from getting an account directly from ATAB NV and not waiting so long and then blaming the defendant for not retaining records and documents when the plaintiff himself seemed to be sleeping on his rights. The plaintiff's claim for aggravated damages and other damages did not have any basis. Regarding the defendant's defence of limitation, there was an acknowledgement of debt made by the defendant when payments of RM55,000 were made. Considering these payments were made between October 2015 and December 2015, the plaintiff filed this action within the legal timeline in December 2019. This defeated the defence of limitation (see paras 54, 61–62, 64 & 66).

(4) There was no documentary evidence to prove that it was indeed a friendly loan other than the vouchers that were not able to prove the terms or conditions of the loan. Further, there were no previous demands from DW1 if it was indeed a friendly loan. DW1 paid RM55,000 to the plaintiff as part of the royalty payments due to the plaintiff (see para 69).

[Bahasa Malaysia summary

Plaintif dan defendan menandatangani satu perjanjian ('perjanjian royalti') dan pengarah defendan iaitu Poh Soon Terng ('DW1') menandatangani perjanjian royalti bagi pihak defendan. Plaintif mendakwa di bawah perjanjian royalti, beliau adalah ejen eksklusif untuk jubin import yang dikeluarkan oleh syarikat Belgium bernama ATAB NV. Berdasarkan perjanjian royalti, defendan kelihatan mempunyai hak eksklusif untuk mengimport jubin untuk dijual di pasaran Malaysia. Selaras dengan itu, wang pendahuluan royalti untuk empat bulan berikutnya, iaitu Jun 1995, Julai 1995, Ogos 1995 dan September 1995 sebanyak RM30,000 telah dibayar kepada plaintif. Plaintif bagaimanapun mendakwa bahawa selepas bayaran pendahuluan ini, defendan gagal membayarnya bayaran royalti berterusan sehingga Oktober 2015. Plaintif melancarkan pelbagai usaha untuk mendapatkan bayaran tersebut. Ini menyebabkan DW1 mengeluarkan lima keping cek peribadi kepada plaintif berjumlah RM55,000. Menurut plaintif, bayaran tersebut berjumlah RM55,000 adalah bayaran royalti untuk Oktober 1995 hingga April 1996. Walau bagaimanapun, tiada bayaran lanjut dibuat oleh defendan sehingga ke tahap ini. Plaintif kemudian meminta daripada defendan akaun dan penyata jualannya dari Jun 1995 hingga Februari 2016 serta jumlah royalti tertunggak yang perlu dibayar kepadanya. Defendan bagaimanapun tidak memberi maklum balas kepada plaintif walaupun tuntutan itu diakui telah diterima. Disebabkan oleh kegagalan defendan untuk membayar baki bayaran royalti kepada plaintif, plaintif memfailkan tuntutan pelanggaran kontrak ini terhadap defendan. Menurut defendan, syarikatnya tidak aktif sejak 2005. Bagi bayaran RM55,000 pula, defendan dan DW1 mendakwa plaintif meminta bantuan kewangan ketika bertemu dengan DW1 pada Oktober

A 2015. Apabila plaintif enggan meninggalkan premisnya tanpa bantuan kewangan, DW1 memberikannya pinjaman persahabatan, dan bayaran tersebut bukanlah bayaran royalti. Ini membawa kepada tuntutan balas DW1 untuk RM55,000.

B **Diputuskan**, menolak tuntutan plaintif dan tuntutan balas DW1:

(1) DW1 bersetuju bukan sahaja fakta bahawa plaintif telah memaklumkan kepadanya bahawa plaintif adalah ejen rasmi ATAB NV dan bahawa dia mempercayai surat daripada ATAB NV yang menyatakan demikian, C tetapi DW1 juga bersetuju bahawa, memandangkan plaintif memberikan defendan mempunyai hak dan membenarkan defendan mengakses ATAB NV, defendan kemudiannya meneruskan pembelian produk secara terus daripada ATAB NV tanpa penglibatan plaintif. Plaintif telah menjadi ejen eksklusif untuk ATAB NV (lihat D perenggan 32 & 34).

(2) Defendan tidak terlibat dalam aktiviti perniagaan yang aktif antara 2005 dan 2018. Memandangkan tiada hasil antara 2005 dan 2018, tiada urus niaga antara defendan dan ATAB NV, jika tidak, ia akan ditunjukkan E dalam penyata kewangan. Selanjutnya, plaintif tidak menawarkan keterangan untuk menyangkal kedudukan defendan. Tiada apa-apa yang mengikat defendan dan ATAB NV bersama-sama sepanjang tempoh berkenaan. Walaupun terdapat fakta tidak konsisten yang dibuat dalam pembelaan yang menyebut tahun 2015 sebagai tarikh mula kedormanan F syarikat, yang dikatakan sebagai kesilapan tipografi di pihak defendan, dan walaupun pada umumnya pindaan diperlukan, ia boleh tidak boleh diabaikan bahawa dokumen yang diberikan semasa perbicaraan menunjukkan bahawa syarikat itu tidak mempunyai sebarang hasil sejak 2005, yang digabungkan dengan keterangan DW1, mencadangkan G bahawa tarikh sebenar adalah 2005, bukan 2015. Defendan tidak menyembunyikan sebarang fakta berkaitan perkara ini. Hanya terdapat percanggahan pada tahun itu, dan tiada percanggahan pada yang lain. Seksyen 114(g) Akta Keterangan 1950 tidak boleh digunakan untuk membuat sebarang inferens bertentangan bagi kegagalan defendan H memberikan data dan angka jualan yang dikatakan diperlukan (lihat perenggan 40, 43 & 50–51).

(3) Memandangkan tiada hasil dari 2005 hingga 2018, tiada transaksi antara defendan dan ATAB NV. Oleh itu, tempoh dari 2005 hingga 2018 adalah tidak relevan dan tidak ada akibat. Dengan s 245(3) Akta Syarikat I 2016 di mana syarikat hanya dikehendaki menyimpan rekod selama tujuh tahun selepas selesai urus niaga atau operasi yang mana penyertaan berkaitan, plaintif kini tidak boleh datang ke mahkamah dan menuntut defendan mengemukakan dokumen yang menjangkau lebih 20 tahun yang lalu. Mahkamah tidak dalam kedudukan untuk mengisytiharkan

hak plaintif untuk mempunyai perintah untuk defendan mengemukakan dan menyerahkan kepada plaintif penyata akaun yang telah diaudit, akaun pengurusan, resit, baucar, invois jualan, pesanan penghantaran, pesanan jualan dan pesanan pembelian antara 25 Mei 1996 dan 12 Disember 2019. Tambahan pula, memandangkan plaintif merupakan ejen eksklusif produk ATAB NV, tiada apa yang menghalangnya untuk mendapatkan akaun terus daripada ATAB NV dan tidak menunggu terlalu lama dan kemudian menyalahkan defendan kerana tidak menyimpan rekod dan dokumen apabila plaintif sendiri seolah-olah tidak mengendahkan haknya. Tuntutan plaintif untuk ganti rugi teruk dan ganti rugi lain tidak mempunyai sebarang asas. Berkenaan pembelaan had masa defendan, terdapat pengakuan hutang yang dibuat oleh defendan apabila pembayaran RM55,000 dibuat. Memandangkan pembayaran ini dibuat antara Oktober 2015 dan Disember 2015, plaintif memfailkan tindakan ini dalam garis masa undang-undang pada Disember 2019. Ini menggagalkan pembelaan had masa (lihat perenggan 54, 61–62, 64 & 66).

(4) Tiada keterangan dokumen untuk membuktikan bahawa ia sememangnya pinjaman persahabatan selain baucar yang tidak dapat membuktikan terma atau syarat pinjaman. Tambahan pula, tiada tuntutan terdahulu daripada DW1 jika ia sememangnya pinjaman persahabatan. DW1 membayar RM55,000 kepada plaintif sebagai sebahagian daripada bayaran royalti yang perlu dibayar kepada plaintif (lihat perenggan 69).]

Cases referred to

Abdul Rahman bin Abdul Karim v Abdul Wahab bin Abdul Hamid [1996] 4 MLJ 623, HC (refd)

Benjamin Lim Keong Hoe v Tan Sri Lim Kok Thay & Ors [2018] MLJU 2186; [2018] CLJU 618, HC (refd)

Khoon Chye Hin v PP [1961] 1 MLJ 105b (refd)

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Legislation referred to

Companies Act 2016 s 245

Evidence Act 1950 ss 101, 103, 114(g)

Limitation Act 1953 s 26(2)

Ganesh Perumal (with Ravindara Kumar Ramasamy, Shasha Aquliah Aziz and Amila Huda Ahmad) (Ganesh & Co) for the plaintiff.

Chris Tan Yew Hong (with Cheong Chun Shung) (JM Chong Vincent Chee & Co) for the defendant.

Raja Ahmad Mohzanuddin Shah JC:

PRELIMINARY

[1] *Vigilantibus non dormientibus jura subveniunt.* The Latin phrase simply means that the law will not help those who sleep on their rights. To put it another way, every person must be aware of their own legal interests at all times, or else the law might be reluctant to assist anyone who does not take vigilant measures to protect their legal rights.

[2] As the case before me demonstrates, the plaintiffs action for breach of contract revolves around the issue of royalty payments alleged to be due to him for the sale of imported tiles from Belgium spanning 23 years before this action was brought.

[3] Originally, this action was filed by the plaintiff against three defendants, namely Best Tile Marketing Sdn Bhd ('the defendant'), Terracotta Tiles Centre Sdn Bhd ('Terracotta Tiles') and Poh Soon Terng ('DW1').

[4] However, Terracotta Tiles and DW1's striking out applications were both allowed by my immediate predecessor on 4 August 2020. On 18 August 2021, the Court of Appeal affirmed these decisions.

[5] Therefore, only a case against the defendant remains. Accordingly, the plaintiff seeks the following:

(a) an order for the defendant to produce and deliver to the plaintiff the audited statement of accounts, management accounts, receipts, vouchers, sales invoices, delivery orders, sales orders and purchase orders from 25 May 1996 until 12 December 2019 being the date when this action was filed;

(b) that 5% of the defendant's net sales from 25 May 1996 until 12 December 2019 be deemed as royalty;

(c) a declaration that an amount equivalent to the 5% royalty be deemed as the sum of royalty payments;

(d) general damages, exemplary damages of RM100,000, punitive damages of RM100,000, aggravated damages of RM100,000, interest and costs;

Or alternatively,

(e) the defendant pays special damages of RM2,122,500 being the accumulated royalty payments from 25 May 1996 until 12 December

2019 as well as general damages, exemplary damages of RM100,000, punitive damages of RM100,000, aggravated damages of RM100,000, interest and costs.

[6] In spite of the fact that the suit against DW1 was struck out, he nonetheless proceeded with his counterclaim for RM55,000.

AN OVERVIEW OF THE FACTS OF THE CASE

[7] On 16 June 1995, the plaintiff and the defendant entered into an agreement ('the royalty agreement').

[8] The defendant's director, DW1, signed the royalty agreement on its behalf.

[9] The plaintiff claims that under the royalty agreement, he was an exclusive agent for imported tiles manufactured by a Belgian company named ATAB NV.

[10] Based on the royalty agreement, the defendant appears to have exclusive rights to import the tiles for sale in the Malaysian market.

[11] Pursuant thereto, a royalty advance of RM30,000 was paid to the plaintiff.

[12] This payment of RM30,000 was made as an advance for four subsequent months, namely June 1995, July 1995, August 1995 and September 1995.

[13] The plaintiff, however, claims that after this advance payment, the defendant failed to pay him continuous royalty payments until October 2015.

[14] As a result, the plaintiff launched numerous efforts to obtain such payments, including faxing reminder letters to DW1 on 29 July 1997 as well as to the defendant and DW1 on 30 August 1997, neither of which were successful.

[15] Another letter dated 7 January 2015 was sent by the plaintiff to the defendant alleging that failure to pay breached the royalty agreement.

[16] This led DW1 to issue the plaintiff with five personal post-dated cheques amounting to RM55,000. The cheques were dated 19 October 2015 for RM5,000, 5 November 2015 for RM10,000, 9 December 2015 for

A RM10,000, 24 November 2015 for RM20,000 and 2 December 2015 for RM10,000, allegedly as royalty payments.

[17] It is interesting to note that it was Terracotta Tiles that issued three vouchers for some of those payments, all of which were duly signed by DW1: Cash Voucher No HLB 515922 dated 21 November 2015 for RM10,000, Cash Voucher No HLBB 515923 dated 21 November 2015 for RM10,000 and an undated Cash Voucher for RM5,000.

[18] The fact remains undisputable that the defendant and Terracotta Tiles share the same director, DW1.

[19] According to the plaintiff, those payments totalling RM55,000 were royalty payments for October 1995 through April 1996, amounting to RM7,500 per month. However, no further payments have been made by the defendant up to this point.

[20] The plaintiff then instructed his previous solicitors, Messrs Sada Raman & Co, to request from the defendant its accounts and sales statements from June 1995 to February 2016 as well as the outstanding royalty sum due to him. This was made by way of a demand letter dated 26 February 2016 which had simultaneously acknowledged the said sum of RM55,000. The defendant, however, had not responded to the plaintiff although the demand was admitted to having been received.

[21] Due to the defendant's alleged failure to pay the plaintiff the remaining royalty payments, the plaintiff filed this breach of contract claim against the defendant. The plaintiff further claims that as a result of his loss, the defendant has been unjustly enriched as well, thereby depriving him of his legitimate expectation of royalty payments.

[22] At this point, it is important to note that the defendant presents a different version of events. According to the defendant, its company has been dormant since 2005. As for the RM55,000 payment, the defendant and DW1 claim that the plaintiff requested financial assistance when he met with DW1 in October 2015. When the plaintiff refused to leave his premises without financial assistance, DW1 granted him a friendly loan, and those payments were not royalty payments.

[23] This led to DW1's counterclaim for RM55,000.

ISSUES BEFORE THE COURT

[24] These are the five common issues to be tried that need to be resolved between the parties:

(a) whether the defendant had engaged in business transactions with ATAB NV from 16 June 1995 till 12 December 2019 being the date of the filing of the suit?

(b) whether the plaintiff is entitled for all of the royalty payments from the accrued date of 25 May 1996 to 12 December 2019?

(c) whether the cheques issued by Poh Soon Terng, director of the defendant to the plaintiff amounting to RM55,000 are part of royalty payments on behalf of the defendant?

(d) whether there exists a friendly loan agreement amounting to RM55,000 between Poh Soon Terng and the plaintiff, and consequently obliged to return the sum of RM55,000 to Poh Soon Terng? and

(e) whether the plaintiff is the exclusive agent for ATAB NV as alleged?

COURT'S ANALYSIS AND FINDINGS

Whether the plaintiff is the exclusive agent for ATAB NV as alleged?

[25] Based on the analysis of the issues before me, I find that it is crucial that I address the last issue raised by the parties first since the issue of the plaintiff being an exclusive agent is critical prior to addressing other issues.

[26] In this regard, the plaintiff claims to be the exclusive agent for ATAB NV, the Belgian tile manufacturer.

[27] Meanwhile, the defendant maintains that there was no evidence presented by the plaintiff to prove that he was ATAB NV's exclusive agent. Due to this, the defendant argues that the plaintiff has failed to establish himself as the 'exclusive agent' for ATAB NV. It is worth noting that since then, ATAB NV has changed its name to IKO NV.

[28] An issue of this nature will require an examination of the royalty agreement prior to anything else. The royalty agreement is reproduced below in its entirety in order to provide clarity:

A

Agreement

On this day, 18th June 1995, it has been agreed between M/s Best Tile Marketing Sdn Bhd and Khew Chee Sun that the undermentioned arrangement will prevail for so long as M/s Best Tile Marketing continue to import branded products manufactured by ATAB n.v. of Belgium direct and is protected as being the sole importer of the same into the Malaysian market.

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For the abovementioned consideration M/s Best Tile Marketing (BTM) will compensate Khew Chee Sun (KCS) as follows:

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1.0 As a first lumpsum compensation, M/s Best Tile Marketing will commit and contribute RM50,000 towards the purchase of a motor vehicle of KCS choice. The discharge of this obligation can be either of the following variations:

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1.1 BTM may elect to purchase the vehicle under HP, registered under BTM, which under this arrangement the RM50,000 remain owing to KCS. KCS at all times has the exclusive use of the vehicle and petrol, maintenance costs, road tax and insurance will be to BTM account. At the end of the HP period or prior, for purposes of transfer of ownership, KCS will arrange to pay the difference between the original purchase price and RM50,000.

1.2 BTM will disburse RM50,000 for KCS own arrangement for purchase of the motor vehicle.

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The aspect of motor vehicle purchase to be effected before 15th of July 1995.

2.0 Henceforth BTM will pay a royalty income to KCS or his appointee, calculated based on 5% of nett sales to BTM customers. Because of hardship, the following special arrangement will also apply immediately:

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2.1 That KCS will receive advanced royalty payments for 4 (four) consecutive months of RM7,500 pm , the first payment being 25th June 1995 and thereafter on the 25th of each month til the fourth month.

2.2 The payments under 2.1 will come off statements of royalty earned, which statements should be available at least quarterly.

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2.3 Payments of royalties, if any, thereafter should be quarterly or earlier.

Should at any time BTM, on their own accord, wish to withdraw from this exclusive arrangement with ATAB, KCS by arrangement with ATAB will have first option to retain the exclusivity.

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Poh Soon Teng, Director
Best Tile Marketing Sdn Bhd

Khew Chee Sun
I/c No. 1335511

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[29] As part of the process of addressing this issue, the fact that the royalty agreement exists further provides clarity in relation to the parties' positions at the time. There is no doubt that the plaintiff and the defendant accepted the

existence and signing of this agreement. There is, therefore, no better evidence to support the finding on this issue than this royalty agreement.

[30] Upon further reading of such an agreement, it appears to me that the plaintiff had conferred the defendant with the right to import the products directly from Belgium. In parallel with each other's responsibilities, the defendant retains the right to be protected as the sole importer of the products into the Malaysian market for as long as the agreement remains in effect.

[31] As part of the royalty agreement, the plaintiff will have the first option to retain exclusive rights if the defendant decides to withdraw from ATAB NV's exclusive arrangement. In the agreement, the term 'exclusive' has been used specifically for that purpose. Besides this, even DW1 agreed that the royalty agreement has never been terminated or cancelled.

[32] In order to arrive at the appropriate conclusion, I must also consider the evidence presented during the trial. Considering this, I find that the defendant has clearly admitted to such an issue that I am being presented with. This being said, DW1, during the cross-examination of him by the learned plaintiff's counsel, agreed not only to the fact that the plaintiff had informed him that the plaintiff was an official agent of ATAB NV and that he trusted the letter from ATAB NV that indicated so, but DW1 also agreed that, since the plaintiff gave the defendant the right and permitted the defendant access to ATAB NV, the defendant then proceeded to purchase the products directly from ATAB NV without the plaintiffs involvement.

[33] In light of the evidence presented during the trial, if the defendant is suggesting there were other agents selling ATAB NV's products, then this must be proved by the defendant. In the event the defendant fails to prove this, then their defence must fall on this basis (ss 101 and 103 of the Evidence Act 1950).

[34] Following my consideration of this issue and analysis of the above facts, it is safe for me to conclude that the plaintiff has been the exclusive agent for ATAB NV based on the evidence that was presented at trial.

[35] I further conclude that based on the findings above, the defendant's argument that the plaintiff cannot be said to be the exclusive agent of ATAB NV because he allegedly did not know whether ATAB NV manufactured only Pol'X or other products does not stand up to the facts.

Whether the defendant had engaged in business transactions with ATAB NV from 16 June 1995 till 12 December 2019 being the date of the filing of the suit?

A **[36]** The plaintiff claims that the royalty agreement has never been terminated. Based on DW1's own evidence, I found this to be true, as previously mentioned. Now that the plaintiffs issue on this has been settled, I will take a closer look at the defendant's position.

B **[37]** The defendant, on the other hand, counters by asserting that the burden of proof lies on the plaintiff to prove the defendant's business transactions with ATAB NV, which allegedly spanned from 16 June 1995 to 12 December 2019. This has not been proven by the plaintiff, as the defendant puts it.

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[38] The defendant further strengthens their position by asserting that the plaintiffs allegation cannot be true because contemporaneous documents show that the defendant has been dormant since 2005. They claim that their case is
D further corroborated by the fact that the defendant reported zero revenue since 2005 as revealed in their audited accounts produced during the trial. In this regard, the defendant relies on the evidence of PW1, an auditor witness subpoenaed by the plaintiff, who allegedly testified that accounting records are not kept beyond seven years and that a dormant company means a company
E with no revenue.

[39] I have carefully examined the plaintiffs position on this issue of dormancy. In the plaintiffs view, since no contemporaneous documents were produced to substantiate the defendant's position, the plaintiff claims that the
F defendant was not a dormant company. Additionally, the word 'dormant' was not found on any company documentation presented at trial, such as financial statements or audited accounts for the relevant years, for instance, which could have supported the defendant's claim.

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[40] In regard to this issue of dormancy, I agree with the defendant's arguments, supported by the relevant financial documentation which seems sufficient to me, that the defendant did not engage in active business activities between 2005 and 2018. Taking into consideration both the plaintiffs general
H assertions and the defendant's financial documents I have at hand, I am inclined to believe the defendant's description of its company in whatever form it may take, which is obviously backed up by the defendant's financial statements.

I **[41]** As evidence of this, the defendant has produced complete sets of Reports and Accounts from 1997 to 2005, followed by Financial Statements from 2001 to 2016 and then Directors' Reports and Audited Financial Statements from 2017 to 2019.

[42] PW1 further testified that sales equal revenue, and if revenue is zero, the defendant is dormant in accounting terms. A lack of revenue, he explained, means a lack of operations. With the earlier financial statements that have been presented for my consideration, I do not have any doubts about PW1's testimony, especially since there was no other witness who could explain anything contrary to his testimony, and the fact that he was also called to testify on behalf of the plaintiff.

[43] Therefore, since there were no revenues between 2005 and 2018, there could have been no transactions between the defendant and ATAB NV, otherwise they would have been reflected in those financial statements. My findings are further reinforced by the fact that the plaintiff offers no evidence to refute the defendant's position. In fact, the plaintiff, during cross-examination, appears to agree that the dormancy period lasted until 2019. Therefore, regardless of whatever condition the defendant faced, there is nothing before the court that ties the defendant and ATAB NV together during the period in question.

[44] As to when precisely the defendant became dormant, the defendant argues that although the defence suggested that they became dormant in 2015, it was a typographical error or mistake on the defendant's part since it should have started in 2005.

[45] Taking issue with the defendant's alleged mistake, the plaintiff argues that the defendant's alleged error is inconsistent between the cause papers filed in court and the oral testimony of DW1 regarding the defendant's actual dormancy period, which makes his testimony unreliable since it is not creditworthy and cannot be trusted. In addition, no documentary evidence has been produced to prove that the defendant has indeed become dormant. According to the plaintiff, documentary evidence is crucial. Furthermore, the plaintiff argues that he would not have knowledge of all the sales and transactions between the defendant and ATAB NV since they are with the defendant, which cannot be verified by the plaintiff without them being produced.

[46] The issues of whether a witness's oral testimony departed from that of his pleaded case and the court's receptivity to conflicting evidence were also dealt with by Abdul Malik Ishak J (as His Lordship then was) in *Abdul Rahman bin Abdul Karim v Abdul Wahab bin Abdul Hamid* [1996] 4 MLJ 623. As His Lordship observed at p 630:

> It is now trite law that when a party in giving his oral evidence in court deviates from his pleaded defence, then his account as narrated to the court must surely be suspect (see *PR Panickar v Chwee May Kwong & Anor* [1958] 1 MLJ 136). The importance of pleadings can never be overstated. Lord Edmund Davis in *Farrel v Secretary of*

State for Defence [1980] 1 All ER 166 in cogent terms made these observations:

> It has become fashionable in these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to play an essential part in civil actions, and although there has been since the Civil Procedure Act 1833 a wide power to permit amendments, circumstances may arise when the grant of permission would work injustice or, at least, necessitate an adjournment which may prove particularly unfortunate in trials with a jury. To shrug off a criticism as 'a mere pleading point' is therefore bad law and bad practice. For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it.

[47] As to how a court ought to deal with conflicting evidence presented by a witness, Thomson CJ in *Khoon Chye Hin v Public Prosecutor* [1961] 1 MLJ 105b clarified this issue in the following manner at pp 106–107:

> Unfortunately from the point of view of the defence on one or two not coincide. Moreover, on at least one point, regarding the ownership of the nets that were being mended, the brother in cross-examination contradicted his own evidence in chief.
>
> As regards the discrepancies between the two witnesses, the trial Judge did not apparently consider these to be of very great importance. As regards the contradictions in the brother's evidence, however, he dealt with the matter as follows:-
>
> > I must, however, in connection with the brother's evidence point out to you that if a witness makes contradictory statements either in one lot of evidence or on two separate occasions on matters upon which his testimony is liable to contradiction then his credit is impeached and the whole of his evidence must be rejected. There can be no doubt that on at least two occasions that witness did contradict himself ... If, Gentlemen, you consider that they were two deliberate contradictions, then you reject the whole of the evidence of that witness. On the other hand, if you think he was nervous and made a genuine mistake, then his credit still stands. It is entirely a matter for you and puts you back as I see the position to the original proposition I put to you in connection with witnesses: was he telling the truth, or, has he by his contradiction established himself as a liar? If it be the latter, then his evidence must in law be rejected.
>
> In our view this is wrong and calculated to mislead a jury. If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion. To say, however, that because a witness has been proved a liar on one or two points then the whole of his evidence 'must in law be rejected' is to go too far and is wrong.

[48] Taking this issue further, some general observations may be made about

the Federal Court's decision in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229; [1979] 2 MLJ 229 that might provide useful guidance concerning the present case. According to Lee Hun Hoe CJ (Borneo), the oral evidence of a witness should be weighed against other contemporaneous evidence and the circumstances surrounding the case. As His Lordship observed at p 234;

> Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity. It may be advantageous at this stage to recall the words of Lord Greene MR in *Yuill v Yuill* [1945] P 15 at pages 19–20:
>
> > 'We were reminded of certain well-known observations in the House of Lords dealing with the position of an appellate court when the judgment of the trial judge has been based in whole or in part on his opinion of the demeanour of witnesses. It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion. But when the court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction. It has never been laid down by the House of Lords that an appellate court has no power to take this course. Puisne judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness. The most experienced judge may, albeit rarely, be deceived by a clever liar, or led to form an unfavourable opinion of an honest witness, and may express his view that his demeanour was excellent or bad as the case may be. Most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge. I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value.

[49] As a result of reviewing these authorities, I can perhaps conclude that if a witness's testimony contradicts his own pleaded case or, for that matter, his earlier testimony, that does not mean that his entire testimony must be rejected outright. In this scenario, the court must carefully analyse the extent of the conflict in such testimony in order to determine whether the witness is lying

through his teeth or if other circumstances could have also contributed to such inconsistency or discrepancy, such as a mistake, forgetfulness or nervousness. If a witness lies throughout his testimony, the entire evidence he provides should be rejected. However, if he appears to have lied on one or two occasions, then his credibility will be impaired. As a result, the court must scrutinise his other testimony with a great deal of caution and suspicion taking into account the other surrounding circumstances that could supplement this testimony in order to verify and ascertain its truthfulness and acceptability. Likewise, if a witness appears to be forgetful or nervous, or there exist mistakes on his part that could have been rectified simply by identifying or referring to other contemporaneous evidence that supports the actual correct position, this evidence can then be taken into consideration. However, I must hasten to add that this does not in any way undermine the importance of pleadings and their fundamentalism in providing a factual narrative and the position taken by a litigant. Hence, whatever the case may be and in supplementing this position, there should be no radical departure from the pleaded case affecting a party's stance in a fundamental way.

[50] Applying the above analogy to the present situation, I find that although there is an inconsistent fact made in the defence that mentions the year 2015 as the start date of the company's dormancy, which was said to be a typographical error on the defendant's part, and despite the fact that generally an amendment is required, I simply cannot ignore the fact that the documents provided during the trial showed that the company has not had any revenue since 2005, which combined with DW1's testimony, suggests that the actual date is 2005, not 2015. This is something that was discoverable only during cross-examination. Moreover, I believe that the defendant did not conceal any facts related to this matter. It remains clear that there is only a discrepancy in the year, and none in any other. The defendant's other defence remains unchanged. As a matter of fact, it is difficult for me to see what prejudice the plaintiff suffers since DW1 was extensively cross-examined by the plaintiffs counsel on this dormant issue.

[51] On the basis of the above findings, I find that s 114(g) of the Evidence Act 1950 cannot be invoked to draw any adverse inference for the defendant's failure to provide the so-called required data and sales figures.

Whether the plaintiff is entitled for all of the royalty payments from the accrued date of 25 May 1996 to 12 December 2019?

[52] This issue will also complement the one above.

[53] Specifically, the issue at hand is whether all royalty payments should be paid to the plaintiff from the accrued date of 25 May 1996 to 12 December 2019.

[54] According to my findings in the previous issue, since there were no revenues from 2005 through 2018, there could have been no transactions between the defendant and ATAB NV. As such, the period from 2005 to 2018 is irrelevant and of no consequence,

[55] Against this background, it further appears that there is in existence an essential piece of information that might shed some light on this issue. The details about this information have been confirmed by IKO NV in their letter dated 20 January 2020. According to IKO NV, who has no interest in this matter, the defendant or Terracotta Tiles have not conducted any sales with them for the period spanning from 2020 and going backwards for the past seven years. Essentially, this means that the plaintiff's claim for royalty payments for 2013 to 2020 is not claimable since there were no sales transactions during this time period.

[56] Let me pause here for a moment to explain what led to the issuance of IKO NV's letter dated 20 January 2020. Following the plaintiffs suit, DW1 emailed IKO NV to request some information regarding sales transactions between ATAB NV and the defendant. According to the email, DW1 informed IKO NV that between 1996 and 2000, the defendant purchased a water-repellent membrane from ATAB NV, known as Pol'X. Therefore, in order to defend this action, DW1 requested sales data information to prove that the defendant had not purchased Pol'X from ATAB since 2000. This prompted IKO NV to respond in such a way.

[57] In analysing this issue, not only have I relied on the emails exchanged between IKO NV and DW1 between 12 January 2020 and 21 January 2020 but I have also taken note of the fact that the questions and answers conducted during the cross-examination of DW1 by the plaintiffs counsel appear to have revealed that the plaintiff has also admitted to the existence of these emails exchanged when accepting that some business transactions took place up to 2000 between the defendant and ATAB NV. These are the relevant notes of proceedings indicating the same:

> RK: Okay. Based on the agreement signed by the parties at page 24, Bundle A, bundle B, sorry, alright, which is dated 16–6–1995. The agreement, the only agreement. Alright, in that agreement, it did not mention any specific products, such as Pol'X, correct? But instead it mentioned branded products manufactured by ATAB. Agreed?
>
> PST: Agreed, agreed. But,
>
> RK: Okay. Still at page 563, alright, I am now looking at 1, 2, 3, 4, 5, paragraph 6

actually. Are you with me Mr. Poh? Same page 563, paragraph 6 from the top. Okay. You actually stated here. 'Unfortunately, ourselves also having missing data on our part. But whatever data we have shows very low transaction with your company.'. This is what you wrote to ATAB.

PST: Yes. I wrote.

RK: Okay. So based on what you wrote, email to ATAB, I put it to you that there was indeed transaction, based on what you wrote.

PST: Yeah, through my memory, there definitely is some transaction I got to agree with you.

RK: Yes, yes, yes. And also through some data, right?

PST: I'm not sure about the data, because what most of it, when we are writing the email, we're basically we're talking about, you know, information.

RK: But this is based on what you wrote.

PST: Yeah.

RK: But whatever data we have shows very low sales transaction with your company. Alright. So now my

question is, you have actually relied on some available data in reaching to both to the findings before you actually wrote to ATAB, based on what you wrote.

PST; But as I said, I recalled it mainly is through the memory. It's not actual physical data that we have. Because we do, when, we do remember 20 years ago, whether I do place some order for this product.

RK: Alright, alright.

PST: Okay.

RK: So there is data, right?

PST: No.

RK: No data?

PST: No, no, because we are trying to search it later on, but we did not find as required by the court.

RK: Okay. Alright. Now, the following sentence, okay, 'We have sales figures, figures of 1997, 1998 and 1999.'. So you have sales figures. 'We believe we have missing figures for year 1996 and maybe year 2000'. So there was indeed sales figures, right?

PST: No, as I stated, there were no basically solid sales figures. We just found some general sales figures. So when I wrote this email, it was very early stage.

RK: Okay. So where is that general figure?

PST: General figures does not indicate any particular product, just general sales product. So you can find them inside the audited accounts and all these things. These are the general sales.

RK: Can you show it to us?

PST: It's already in the audited account, so I'm not sure which particular one, Because my staff. We thought we got some data, but we found that no, those are not the actual data we wanted that is related to these sales.

[58] Furthermore, it is pertinent to note that the transactions confirmed by such emails also occurred before 2005, when the defendant turned dormant. This strengthened the defendant's position on the company's so-called dormancy, stating that there were no revenues during that period, between 2005 and 2018.

[59] On the question of the plaintiffs entitlement to royalty payments for the period between 16 June 1995 and 2005, that is, the period before the defendant became dormant, I also take cognisance of the fact that under s 245(3) of the Companies Act 2016, companies are only required to retain records for seven years after the completion of the transactions or operations to which the entries relate. For completeness, s 245 of the Companies Act 2016 provides the following provisions:

245 Accounts to be kept

(1) A company, the directors and managers of a company shall —

(a) cause to be kept the accounting and other records to sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto to be prepared; and

(b) cause the accounting and other records to be kept in a manner as to enable the accounting and other records to be conveniently and properly audited.

(2) A company, the directors and managers of a company shall cause appropriate entries to be made in the accounting and other records within sixty days of the completion of the transactions to which the entries relate.

(3) The company shall retain the records referred to in subsection (1) for seven years after the completion of the transactions or operations to which the entries relate.

(4) The records referred to in subsection (1) shall be kept at the registered office of the company or at such other place as the directors think fit, and shall at all times be open for inspection by the directors.

(5) Notwithstanding subsection (4), the accounting and other records of operations outside Malaysia may be kept by the company at a place outside Malaysia provided that such accounting and other records shall be sent to and kept at a place in Malaysia and be made available for inspection by the directors at all times.

(6) The accounting and other records referred to in subsection (5) shall include such statements and returns with respect to the business dealt with in the records so kept as to enable the preparation of true and fair financial statements and any documents required to be attached to the financial statements.

(7) If any accounting and other records are kept at a place outside Malaysia under subsection (4) or (5), the Registrar may require the company to produce those records at a place in Malaysia or determine the type and manner of the records to be kept in Malaysia.

(8) The Court may, in any particular case, order that the accounting and other records of a company be open to inspection by an approved company auditor acting for a director, subject to a written undertaking given to the Court that information acquired by the auditor during his inspection shall not be disclosed by him except to that directed

(9) The company and every officer who contravene this section commit an offence and shall, on conviction, be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both.

[60] In this regard, PW1, as an experienced auditor, confirmed without hesitation that a company does not keep accounting records beyond seven years.

[61] In light of this position, even if the plaintiff appears to be acting within the timeline, he did not demonstrate any seriousness to enforce his rights, essentially sleeping on them. Therefore, having s 245(3) of the Companies Act 2016 in my mind, the plaintiff cannot now come to court and demand the defendant to produce such documents spanning over 20 years ago. In consequence, I am certainly not in a position to declare the plaintiffs right to have an order for the defendant to produce and deliver to the plaintiff the audited statement of accounts, management accounts, receipts, vouchers, sales invoices, delivery orders, sales orders and purchase orders between 25 May 1996 and 12 December 2019. In light of my findings here, the plaintiff does not have a basis for arguing that the defendant did not comply with the plaintiffs discovery order dated 8 December 2020 in failing to provide management accounts, receipts and vouchers from May 1996 to 12 December 2019.

[62] Moreover, it appears to me that the plaintiffs alternative claim for RM2,122,500 is also unjustifiable given my earlier findings. In this regard, the plaintiff has failed to prove his case on a balance of probabilities. Furthermore, since the plaintiff was an exclusive agent for ATAB NV's products, there was nothing stopping him from getting an account directly from ATAB NV and not waiting so long and then blaming the defendant for not retaining records and documents when the plaintiff himself seems to be sleeping on his rights. The other evidence of this can be found in the fact that it took the plaintiff a further three and a half years after the plaintiffs previous solicitors sent a demand letter to the defendant on 26 February 2016. In spite of the plaintiffs

grief over the death of Mr Sada Raman since the plaintiff and the late Mr Sada Raman were classmates, the plaintiff has been waiting for such a long period to enforce his rights in this regard.

[63] In this context, the maxim 'delay defeats equity' may also be applicable to the current situation. This is because the plaintiffs relief for a declaration stands on its own as an equitable remedy. In *Benjamin Lim Keong Hoe v Tan Sri Lim Kok Thay & Ors* [2018] MLJU 2186; [2018] CLJU 618, Wan Ahmad Farid Wan Salleh JC (as His Lordship then was) explained this issue in the following extract from His Lordship's judgment:

> [40] Secondly, the plaintiff in the instant case sought for declaratory reliefs *inter alia* that the General PA is rescinded or otherwise set aside. It is trite law that a declaration is an equitable remedy; *Chen Kow v Yew Sin Motor Supply Sdn Bhd* [1994] MLJU 414; [1994] 4 CLJ 495. In *Matair Suhaili & Anor v Rose Foo Chin Lan & Ors* [2007] 6 MLJ 125; [2007] 5 CLJ 406 (CA), Mokhtar Sidin JCA reiterated the same proposition of law that he was 'fully aware that declaration is an equitable remedy'. In the circumstances, the equitable remedy should be governed by equitable maxims.
>
> [41] The plaintiff took more than four years from 10 January 2013 when the plaintiff had first signed a board resolution with the second defendant in his capacity of a donee in GDSB to the date of filing of this suit. The delay, in my finding, is inordinate. I cannot accept the plaintiffs explanation in his Striking Out AIR and statement of claim that he had no reason to suspect anything was wrong with the General PA until the first and second defendants launched an attack in a related case at the Kuala Lumpur High Court in the OS registered as WA-24NCC-70–03 of 2017 in respect of a resolution made in GDSB ('the OS 70'). Since the reliefs sought are equitable in nature, in the form of declarations, I cannot underline more than to reiterate the time honoured equitable maxim that delay defeats equity.

[64] This further proves that even if the royalty agreement has never been terminated, the plaintiff still slept on his rights, in this scenario, how can he then say that he was denied the opportunity to give the exclusivity right to import the tiles to another company? It further establishes that the plaintiffs claim for aggravated damages and other damages does not have any basis.

[65] I also take the opportunity here to mention that even if the dormancy issue was not communicated to the plaintiff, the fact further shows that the plaintiff was not interested in pursuing this matter. Despite the plaintiff alleges that he had issued letters through fax on 29 July 1997 and 30 August 1997, I find that there is no evidence that they were sent to the defendant. There was no fax sent confirmation produced to allow a meritorious consideration on this issue.

[66] As a final note on this issue and for completeness, I would like to address the defendant's defence of limitation. In this regard, I find that there was an acknowledgement of debt made by the defendant when payments of RM55,000 were made, as discussed above. Considering these payments were made between October 2015 and December 2015, the plaintiff filed this action within the legal timeline in December 2019. This defeats the defence of limitation. To this end, s 26(2) of the Limitation Act 1953 provides for the following:

> 26 Fresh accrual of action on acknowledgment or part payment
>
> (2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:
>
> Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder of the rent or interest then due, but any payment of interest shall have effect, for the purposes of this subsection only, as if it were a payment in respect of the principal debt.

Whether the cheques issued by Poh Soon Terng, director of the defendant to the plaintiff amounting to RM550 are part of royalty payments on behalf of the defendant?

Whether there exists a friendly loan agreement amounting to RM55,000,00 between Poh Soon Terng and the plaintiff, and consequently obliged to return the sum of RM55,000 to Poh Soon Terng?

[67] Both of the issues mentioned above can be addressed simultaneously.

[68] The defendant argues that it is the plaintiffs burden to prove that RM55,000 was part of the royalty payments paid on behalf of the defendant. The plaintiff claims, however, that DW1 bears the burden of proving a friendly loan of RM55,000.

[69] In this regard, I find that there was no documentary evidence to prove that it was indeed a friendly loan other than the vouchers that are not able to prove the terms or conditions of the loan. Furthermore, DW1 agreed that it was he who wrote, 'Being payment for Settlement on behalf of Best Tile Marketing S/B'. In fact, DW1 agreed with both of these facts during his cross-examination. Further, there were no previous demands from DW1 if it was indeed a friendly loan.

[70] In this aspect, my earlier findings suggest that DW1 paid RM55,000 to the plaintiff as part of the royalty payments due to the plaintiff. Moreover, I

cannot accept DW1's explanation that he loaned the plaintiff the money because the plaintiff refused to leave his office unless such an amount of money was loaned to the plaintiff The facts and evidence that have been duly analysed above clearly refute such a claim.

CONCLUSION

[71] Based on the findings above, I am bound to dismiss both the plaintiffs claim and DW1's counterclaim. The parties are to bear their own costs.

Plaintiff's claim and DW1's counterclaim dismissed.

Reported by Ahmad Ismail